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No. 597, Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

IN THE MATTER OF THE PETITION OF THE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL FOR WRITS OF PROHIBITION AND/OR MANDAMUS.

ANSWER OF INTERVENOR, MYTINGER AND CASSELBERRY, INC., TO PETITION OF FEDERAL SECURITY ADMINISTRATOR, ET AL., FOR WRITS OF PROHIBITION AND/OR MANDAMUS.

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ANSWER OF INTERVENOR TO PETITION OF FEDERAL SECURITY ADMINISTRATOR, ET AL.

Now comes Mytinger and Casselberry, Inc., Plaintiff in the case of Mytinger and Casselberry, Inc. v. Ewing, et al., No. 5208-48, District of Columbia, under leave granted by this Honorable Court on May 9, 1949, and replies to the Petition of the Federal Security Administrator and the Attorney General for Writs of Prohibition and/or Mandamus as follows:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted in part, with the following qualifications:

Examination of the records of Petitioners pursuant to the order of the Special Court granting authority for such examination reveals that the Petitioners have prepared the papers for the libel actions in Washington and have sent them to the various district attorneys with a request that they be filed and that "immediate seizure" be made of Intervenor's product; all responses to the various libel papers are also handled directly by the Petitioners in Washington. The various district attorneys have been forbidden to agree to consolidation and removal of the cases to the Federal District courts in San Francisco or Los Angeles. Further, the various libel papers have been prepared and sent out in mimeographed form so that Petitioners were preparing to and are in a position to make many new seizures in the same way with all possible speed throughout the Nation. The files of Petitioners further reveal statements that "the Administration has underway a multiple seizure program" against Nutrilite Food Supplement, as a part of which they are interrogating users and distributors of the Intervenor's product all over the United States.

4 and 5. Paragraphs 4 and 5 are admitted with the following essential explanation: The first seizure action was made on September 30, 1948. Seizures were then made in New York City on October 14, 1948, and in Buffalo, New York on October 28, 1948. In each of these first three cases the libel papers claimed that certain testimonials published on pages 37 through 58 in the then current 58-page edition of the advertising pamphlet "How to Get Well and Stay Well" were misleading. The Intervenor then sent telegrams to every person having a copy of said booklet instructing them to take these pages out of said booklet and continue selling its product by use of *the remaining 36 pages which Petitioners had not questioned.* Although Intervenor disagreed with the Petitioners' contentions as to pages 37 through 58, it thought it should, in

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good faith, not use anything attacked by the Petitioners.

The next move of Petitioners was the seizure action in Hastings, Nebraska on November 24, 1948, based on a claim that the remaining 36 pages are misleading. This seizure was in direct violation of an agreement by the Petitioners file no further seizure actions until determination by the Supreme Court of the United States of the case of *Kordel* v. *United States,* No. 30, 1948 Term, decided Nov. 22, 1948. (See affidavit of Casselberry, filed as an exhibit to the original complaint). In their affidavits the Petitioners now contend that they only intended the agreement to mean that they did not intend seizures in the Los Angeles District. (Larrick affidavit, filed by Petitioners, Paragraph 14). The further seizures in Clarkfield, Minnesota and Spokane, Washington, were then made, based upon the claim that this 36 page booklet was misleading.

The seizures in St. Petersburg, Florida and in Seattle, Washington and the second seizure in Belleville, New Jersey were based upon the 36 page pamphlet with 8 added pages, which is the current booklet in use. The two seizures in Chicago, Illinois (and there are two instead of one as indicated) are based upon both the 36 and 42 page booklets.

In each libel case Intervenor has employed local counsel, filed an answer, posted a bond for costs, and done all things necessary to get each case ready for trial. No motion to consolidate and remove was filed prior to the filing of the injunction action because Intervenor could not be sure but what there would be an untold number of new seizure cases, as Petitioners had, in discussing the claim of violation of the agreement not to make more seizures, advised of their intention to make more seizures. (Complaint, paragraph 11). It would not do any good to consolidate the pending cases and then have other cases and other motions to consolidate such cases follow swiftly thereupon. A motion to consolidate and remove has been filed in New Jersey together with a motion to dismiss these actions as illegally instituted under the decision of

Judge Pine so holding (See transcript of hearing, Jan. 24, 1949). These motions were scheduled to come up for hearing but were delayed at the request of the Assistant District Attorney, who wanted to find out whether Petitioners wished to send someone from Washington to argue the motions. In the meantime the Special Court entered its order on April 6, 1949, and Counsel for Intervenor suggested to the District Attorney that the matter be held in abeyance by mutual consent, and that is the status of the motion now.

6. Intervenor admits the first sentence of Paragraph 6. The other statements in said paragraph are incorrect and Petitioners are well aware of this. For example, it is claimed in this paragraph that the booklet mentions chronic conditions "which may well be diabetes or cancer" but Petitioners' own doctor, Dr. Robert C. Butz, in the deposition he gave, testified as follows:

> "Q. What is your understanding of the word 'chronic', Doctor?
>
> "A. 'Chronic' is a condition that exists for a period of time in contrast with acute. You could have a chronic condition which would flare up and be acute. But 'chronic' usually implies that it exists over a longer period of time than is ordinarily found in diseases. For instance, if you have a cold that lasts a week, that is acute. If it lasts a period of months it would be chronic." (Deposition of April 25, 1949, pages 27-28)
>
> "Q. Doctor, do most doctors bring about an immediate improvement in patients with chronic ailments?
>
> "A: No, unfortunately.
>
> "Q. I believe you said earlier when you referred to chronic ailments you include things other than, say, the incurables like cancer—
>
> "A. I include everything in chronic diseases.
>
> "Q. It is a broad term?
>
> "A. Chronic diseases refers to those diseases which you have over a prolonged period of time.
>
> "Q. Well, if somebody uses the word 'chronic', you don't understand by that, that they are referring to cancer, is what I mean?

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"A. Not necessarily, no." (Deposition of April 25, 1949, pages 64-65)

The booklet is devoted entirely to a discussion of deficiency diseases brought about by lack of proper diet. The booklet discusses the symptoms of the various deficiency diseases and the vitamins which are of assistance in preventing deficiency diseases. The booklet repeatedly states that Nutrilite will not cure anything. At no place therein is there the representation claimed by Petitioners that Nutrilite will cure tuberculosis, cancer, heart disease, glandular and nervous disorders or the ills that commonly affect mankind. Said statement has no basis whatever in fact and is evidently designed as a use of the "scare" technique in the hope of prejudicing the Court against Intervenor.

On the statement about experimentation with health before consulting a physician, the booklet does just the opposite, as it repeatedly suggests consultation with physicians. That the Petitioners have *no evidence whatever* that Nutrilite has injured or damaged any person has been clearly brought out in the depositions taken of Petitioners' officers and employees to date in which such fact is admitted. An examination of the files of Petitioners reveals that not one single user has complained to the Petitioners about Nutrilite—a most remarkable situation in view of the thousands of users of the product. Answering further, Intervenor states that the Petitioners have made unsupportable statements similar to those in Paragraph 6 before the Three-Judge Court, yet they now vigorously oppose that Court's inquiring into the truth of the statements made by Petitioners even though such statements are related to the issue of oppressive exercise of authority herein.

Intervenor further cites repeated admissions by Petitioners in the several arguments, transcripts of which are on file in this Honorable Court, that its product, "Nutrilite Food Supplement" is non-toxic and non-dangerous. Peti-

tioners likewise admit in their answer that Nutrilite is absolutely harmless. (Answer, par. 4).

7 and 8. These paragraphs are not an accurate statement of the original complaint and the relief there prayed. That complaint affirmatively states that prior to the current litigation the booklet was, after criticism from Petitioners, republished in "revised form in conformance with the views of the Food and Drug Administration as the same were expressed to Plaintiff and its attorney." (Paragraph 7.) The Complaint sets forth in detail the oppressive harassment and unlawful and arbitrary conduct of the Petitioners as far as then known to Intervenor and none of these facts are set forth in Paragraph 8 by the Petitioners. Intervenor admits that the original Complaint, unlike the amended Complaint, did set forth in Paragraph 13 thereof many allegations about lack of information about the Administrative action taken by Petitioners. The decisions authorizing multiple seizures which were made by Petitioners on September 30, 1948, December 2, 1948, and December 9, 1948, were made *secretly* and no copy thereof was served upon Intervenor until January 17, 1949, when they were attached to the first motion of the Petitioners herein.

9. This paragraph is not an accurate statement of the facts because Judge Pine in denying Petitioners' motion to dismiss, as the order itself shows, did not deny Intervenor's motion for a temporary injunction. Judge Pine in fact stated he would grant the injunction if it was necessary to protect Intervenor from Petitioners, but Petitioners agreed to make no seizures rather than have the injunction issued against them.

10 and 11. The amended Complaint makes substantial changes from the facts alleged in the original Complaint. These changes state new facts and restate other allegations in the light of the facts brought out in the January 24 and March 3 hearings before Judge Pine and in the papers,

affidavits and representations made by the Petitioners which revealed some of the administrative action taken, and which action indicated further oppressive acts or action designed to irreparably injure Intervenor. Contrary to the Petitioners' statement that the only substantial changes are in Paragraphs 18 and 24-26, attention is called to the six additional seizures set forth in Paragraph 11 of the amended Complaint; the entirely new paragraph 12 of the amended Complaint, alleging a sales loss of $100,000 per month from Petitioners' unlawful actions and great and irreparable damage to the good will of Intervenor's business and to the morale of its national distribution organization. In the same paragraph is the statement that if the threatened libels are filed Intervenor's good will and business will be almost completely destroyed and irreparably injured before Intervenor can obtain a hearing and adjudication of the lawfulness of its advertising and labeling in any of the libel actions; in paragraphs 14 the number (approximately 5,000) of distributors selling Intervenor's product is set forth for the first time; in paragraph 16 it is alleged that the prosecution of the seizure actions by Petitioners in widely separated parts of the United States "is deliberately calculated by Defendants to be oppressive"; paragraph 18 is completely new showing 2 denials of a hearing and other arbitrary and oppressive action of Petitioners; paragraph 24 through 26 and prayers 4 through 9 are new—all setting forth new facts and contentions on the issues of oppressive abuse of power and unconstitutional action by Petitioners.

The action of Judge Tamm in granting the temporary restraining order on February 24 was made upon consideration of the facts found and set forth in that restraining order showing irreparable injury to Intervenor—facts which Counsel for Petitioners, who was present at the time the restraining order was granted, admitted were true even though he did vigorously oppose the granting of the temporary restraining order.

At the argument on April 6 before the Special Court, Counsel for both sides argued the constitutional question, although the transcript reveals that Counsel for the Intervenor advised the Court that he was relying in addition upon relief from the arbitrary action of the Petitioners and that he did not wholly agree to the Petitioner's contentions about Judge Pine's decision and the law of the case created thereby. (Transcript, pp. 45, 47, 51, 55, 58, 60.) Attention is called to the following at page 55 of the Transcript of the Argument:

> "JUDGE GOLDSBOROUGH: Did Judge Pine hold that the words 'without hearing,' allow the board to make decisions to act arbitrarily and not in good faith, and with no recourse to be had to the courts to correct that situation? Is that what he held?
>
> "MR. KLEINFELD: *The only issue threshed out before Judge Pine was that the statute required, really required a hearing, and if the Administrator did not give a hearing he was therefore acting arbitrarily.* That was the entire substance of plaintiff's complaint.
>
> "JUDGE GOLDSBOROUGH: *Then Judge Pine hasn't passed on the question of whether or not if the action of the Administrator was arbitrary and capricious and not in good faith that no remedy could be successfully gotten from a court, on injunctive process.*
>
> "MR. KLEINFELD: Well, words of that general character were contained in the original complaint. Plaintiff's original complaint was long, contained very many allegations and conclusions." (Italics supplied.)

It is therefore clear that Judge Pine did not, by the admission of Petitioners' own counsel, pass directly upon the issue of arbitrary abuse of power by Petitioners.

Intervenor did not understand that the Petitioners' Motion to Dismiss and the granting of the temporary restraining order had anything to do with any suggestion as to a stipulation. It is the understanding of Intervenor that the Court denied the Motion to Dismiss and granted a temporary restraining order and that the restraining order

was intended solely to keep the matter in *status quo* until the Court could receive evidence before passing upon the motion for a preliminary injunction. It was also not the understanding of Intervenor that the trial on the merits was to be confined in any way to the question as to whether the booklet (or labeling) was misleading. The unfortunate illness of Judge Goldsborough prevented the hearing on April 11th, at which Counsel for the parties were to be informed with respect to the Court's views.

12. In response to Paragraph 12 Intervenor states that the excerpts from the pretrial transcript quoted in this paragraph are not an accurate statement of the understanding which Counsel had of the issues which would be before the Three-Judge Court at the trial scheduled for May 9. It was the understanding of Intervenors that the issue of whether the booklet or labeling was misleading was a part of the broader issue of oppressive, harassing, arbitrary and unlawful conduct of Petitioners, which conduct in itself denied Intervenor due process of law.

That counsel for the Petitioners likewise understood this matter is shown by a statement made at the argument on the Motion to Quash Subpoenas before Judge Clark on April 19, when Judge Clark stated in part at page 11 of the Transcript:

> "JUDGE CLARK: . . . Since there has been an amended complaint filed, we think we not only have the question of constitutionality but also the question of oppressive use of what may be a constitutional process in force.
>
> "That is what we want to be enlightened on.
>
> "In that view it seems that the complainant is entitled to take evidence.
>
> "MR. GOODRICH: We do not dispute that."

No request by the Petitioners for a pretrial order has ever been communicated to Intervenor or to the Court to Intervenor's knowledge. No pretrial order as such was possible prior to the filing of the answer of Petitioners, which answer had not been filed at the time of the informal

pretrial conference discussion before Judge Tamm on April 13.

13. This paragraph, like the excerpts in paragraph 12, gives the wrong impression of the informal discussion at the Pretrial Conference. Counsel for Intervenor did understand this *Conference* to be an informal discussion rather than the usual formal *pretrial hearing*. It was held in chambers rather than in open Court and in reading the Transcript, great leniency is required because of this informality. Also, Counsel were summoned rather hurriedly and no opportunity was given to prepare in detail as in the case of the usual Pre-trial formal hearing. An examination of the transcript shows that Judge Tamm advised Counsel that the Court, in issuing the restraining order, "Did not act solely upon the constitutional question involved, but attempted to consider the complaint and the answer (Defendants' affidavits) upon the basis of the merits of the cause." The Court then further stated:

> "The Court consequently issued a restraining order rather than a temporary or permanent injunction in a desire to continue the status quo and *notify counsel that the three-judge court would go beyond the constitutional question and consider the case on its merits, so that everyone would come to Court with a full understanding of all the Court was going to consider.*"

It is to be noted from an examination of the transcript that it was Counsel for Petitioners' constant discussion of the booklet which kept the informal discussion on that item rather than the broad issues which the Court mentioned from time to time. Failure of Judge Tamm to carefully relate the misleading character of the booklet to the issue of oppressive abuse of power each time he referred to the booklet certainly did not lead Counsel for Intervenor to believe that he could fail to prove all the other allegations in the Complaint on that broad issue and still prove a full case on the merits as indicated at the Pre-trial Conference. In addition to the statement of the Court

just referred to, the Court on pages 9 and 10 pointed out that the Court considered that the amended Complaint brought before it "all the issues raised by the entire pleading of the amended complaint." These issues involve the booklet as the Petitioners have constantly used the booklet as an alleged justification of their oppressive, arbitrary and unlawful action and *in fact seemingly used said booklet to direct attention away from the broader issue.*

It is not believed that the lifting of excerpts of statements by the Court made during the course of this informal conference is a fair representation of the understanding which all Counsel secured from the pretrial conference as to the issues to be tried. The statement of Petitioners' counsel, Mr. Goodrich, which is quoted above, indicated that the present position of Petitioners, and Petitioners' claim that the Three-Judge Court will try the character of the booklet as a separate issue rather than as a part of the broad issue of oppressive and abusive conduct of Petitioners, is not the understanding of all of Petitioners' Counsel as Mr. Goodrich also represented Petitioners at the pretrial conference.

14. In response to this paragraph Intervenor believes that the best and complete answer is that found in the transcript of the argument and the full text of the order which was signed. It is to be noted that this order gives equal opportunities to both parties to examine officers and employees of the other party as witnesses and to examine the records of the other party to discover evidence with all questions as to admissibility properly reserved to the trial. Petitioners bring the last part of their sixth point in the motion up to point number one in restating the Motion in their Petition in the evident hope of persuading the Court that authority was given to probe the mental processes of the Administrator. The record clearly indicates that the only authority given was that of the taking of depositions for the purpose of discovery of records and

development of evidence with all questions as to propriety and admissibility of the evidence developed to be passed upon at the trial. The subpoenas to subordinate employees were not identical with the subpoena to Mr. Ewing to which the motion was addressed.

15, 16 and 17. These paragraphs constitute legal arguments rather than factual statements, all of which arguments are answered in detail in the brief entitled "Plaintiff's Points and Authorities in Opposition to Defendants' Motion to Dismiss", a copy of which has been filed herein for each member of the Court, attached to the Motion for Leave to Intervene. Because of the short period of time which is available Intervenor does not herein undertake to answer point by point the errors in the arguments made in these three paragraphs but relies upon said brief as its answer.

18. The brief referred to in response to paragraphs 15, 16 and 17 in part answers the legal contentions made in paragraph 18. In addition, the product of which Intervenor is now the national distributor has been sold since 1933 and the Larrick affidavit attached to Defendants' Motion to Dismiss states that this business has been under supervision by Defendants since 1939. The same affidavit claims that the booklet used in 1939 to sell Intervenor's product is subject to the same criticism as the booklet now in use. Why Defendants waited ten years to move against the product on the basis of the alleged misleading character of the booklet is unexplained. Certainly, under such circumstances, Petitioners now show no impelling public necessity for speed. Any possible error which might be made by the Three-Judge Court could be corrected upon appeal long before any such period of time would elapse. As stated above, *the officials and employees of the Petitioners whose depositions have been taken have admitted that they have no evidence of any injury or damage to any member of the purchasing public from Nutrilite or the booklet used*

in selling said product. These officials do claim that in their "opinion" the booklet is misleading and it "might" possibly cause injury or damage to purchasers of the product who buy after reading it, but they have no evidence whatever to back up their opinion. The Amended Complaint specifically alleges that a very large percentage of Intervenor's sales are to persons who buy because of favorable recommendations of users (Paragraph 5) and *this "large percentage" could not possibly be injured or damaged by the booklet as they never see it at all.*

The position of the Petitioners in this paragraph of again attempting to argue about the contents of the booklet, yet at the same time insisting that the Three-Judge Court cannot determine the truth of their charges against it, as a part of the other issues in the case, creates a situation where Petitioners are claiming the right to condemn with the further right that no one can question what they say!

WHEREFORE, the Intervenor respectfully prays that:

1. The writ of prohibition prayed for be denied because the Three-Judge Court is exercising a jurisdiction which it has in holding a trial to receive evidence on the issues of (A) Constitutionality of the multiple seizure section of the Food, Drug and Cosmetic Act in denying Intervenor a hearing before its property is destroyed and its business irreparably injured by multiple seizure actions for which injury Intervenor has no adequate remedy in the libel cases or in any other place other than this Special Three-Judge Court and (B) oppressive, arbitrary and unlawful conduct of the Petitioners as a denial to the Intervenor of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The fact that Petitioners have themselves injected the issue of the character of the booklet used to sell Nutrilite Food Supplement as a claimed defense to said broader issues does not deprive the Three-Judge Court of jurisdiction to consider

the issues, as they involve that booklet simply because the libel courts may be required to examine that booklet on another more narrow issue.

2. That the request for a writ of mandamus be denied because the jurisdiction of the Three-Judge Court is not limited solely to determining whether Section 304(a) of the Food, Drug and Cosmetic Act is invalid as applied to Intervenor under the facts in this case, because it allows the making of decisions inflicting irreparable injury "without a hearing". Having acquired jurisdiction to try this substantial constitutional issue the Three-Judge Court can and should hear all other issues in the case.

Respectfully submitted,

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NO REASONS OF LAW OR FACT JUSTIFY ISSUANCE OF THE EXTRAORDINARY WRITS REQUESTED BY PETITIONERS.

I. Petitioners' Interpretation of the Legislative History of the Act is Misleading and Inaccurate

The initial reason assigned by Petitioners for granting the writs prayed for is that the statutory scheme of the Federal Food, Drug and Cosmetic Act of 1938 did not provide the District Court with jurisdiction to determine whether or not Intervenor's labeling was misleading. Through the clever device of quoting from inapplicable phases of the legislative history of the Act, they attempt to show that the words "without hearing" are founded upon an explicit Congressional intent.

Primarily, it should be observed that the Petitioners' brief endeavors to convey the impression that the words "without hearing" were included in the Act as a part of the entire deliberation and consideration by Congress of the Act. Realities fail to sustain this position, and in the paragraphs to follow, it will be undeniably demonstrated that the words "without hearing" were inserted at the very last possible minute by the Conference Committee which was appointed to reconcile the difference in the versions of the bills as passed by the Senate and by the House of Representatives. The legislative history of these particular words, it will be shown, begins with their appearance in the Conference Report—the report of the *75th* Congress on the Bill which became the Federal Food, Drug and Cosmetic Act of 1938.

Before directing this Honorable Court's attention to the details of the "last minute" unexplained and unnoticed inclusion of the words "without hearing" as well as of the phrase ". . . in a material respect misleading to the injury or damage of the purchaser or consumer" it should be observed that in footnote 2 on page 18 Petitioners' brief quotes from a House Report of the *74th* Congress—the Congress which did *not* adopt the Bill. This report was based upon a bill which was before the 74TH CONGRESS, and as this Court well knows, all legislation pending at

the adjournment of a session of Congress, dies with such adjournment. The 75TH CONGRESS enacted the Federal Food, Drug and Cosmetic Act of 1938—not the 74th. References to reports considered by prior Congresses without adequate explanation can only serve or tend to convey erroneous impressions. When Petitioners erroneously cite the old report of the 74th Congress as "The House Report" and then say in the very next sentence "And finally the Conference Committee inserted the words 'without hearing' . . .," they are giving a most erroneous impression. The Report of the House upon the Bill of the 75th Congress which, as amended in Conference, actually became law is House Report No. 2139, 75th Congress. Moreover, such an impression is doubly prejudicial and damaging in view of the recitation of the facts hereinafter which show that these particular words, "without hearing" as well as the phrase in a material respect misleading *"to the injury or damage of the purchaser or consumer"* have no legislative history until the 75th Congress, when as aforesaid they appeared for the first time in the Conference report. The legislative history in this case in this particular is far more informative through its silence or failure to disclose a specific Congressional intent than for that which it does disclose.

For the 5-year period from 1933 to 1938, Congress was considering appropriate legislation to replace the Federal Food and Drugs Act of 1906. During this period many varying measures were introduced; many revisions and amendments were accepted and rejected; many Committee and sub-committee hearings were conducted; and many debates took place on the floors of the Senate and House of Representatives.

But, notwithstanding active and intensive consideration of the various drafts of the bills during this 5 year period, not a single draft contained the words "without hearing" or the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" which now appear in the multiple seizure provisions of the Federal Food, Drug and Cosmetic Act of 1938. There is not the

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slightest suggestion in the legislative history of this Act that such words existed prior to the report of the Conference Committee referred to above, which was submitted by such Committee several days prior to the final Congressional approval of the Act. After five long years of frequent debate and compromise, the crucial words "without hearing" appeared only in the Conference report which came out at the last minute.[1]

It should also be observed in connection with the appearance of these words in the report of the Conference Committee that neither the Senate nor the House versions of the measure which were passed by the 75th Congress and sent to Conference, or for that matter neither the versions which were before any of the previous Congresses, contained any language which remotely approached that which cropped up most hastily and unexpectedly in the Conference report for the first time. The legislative annals reveal that the major debates did not take place on the Conference report of the 75th Congress—they took place upon the other Bills introduced in the respective houses of Congress, and which, as noted above, were silent as to this phraseology.

Perhaps of equal significance with this apparent afterthought of inserting the words and phrase quoted above is the fact that when the Conference Committee's report was presented to the Congress, not the slightest effort was made by the sponsors of the bill, or the conferees themselves, to explain their inclusion to the members of the two houses either in the report or on the floor of Congress.

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[1] The dates upon which the conferees were appointed, upon which the Conference Committee agreed on the final language, upon which their report was submitted, and upon which it was accepted are most revealing. On June 2 and 3, 1938, the Senate and House conferees, respectively, were appointed. 83 Cong. Rec. 7955, 8169. On June 10, 1938, the conferees agreed upon the manner in which the differences would be settled. On that same day, the Senate received the Conference Report and adopted it. 83 Cong. Rec. 8731. No one could seriously contend that any of the Senators, except those on the Conference Committee, knew of the existence of the words "without hearing" as they did not see or hear the text of the bill until it came out the next day in the Congressional Record as inserted by Senator Copeland at the time he asked for the vote approving it. On June 11, 1938, the Conference Report was submitted to the House of Representatives and on June 13, 1938, it was there accepted. 83 Cong. Rec. 9087, 9095-9101.

Both houses speedily accepted the report, and it became the law of the land.

It cannot be said with accuracy, therefore, that Congress had lent the same painstaking and careful deliberation to the inclusion of the words "without hearing" and the phrase in a material respect misleading "to the injury or damage of the purchaser or consumer" in setting up the statutory scheme as it had to the various other aspects of the Act. Such a contention is completely rejected by the significant silence of the legislative history of the Act respecting this particular verbiage, and the circumstances which surrounded its adoption.

Petitioners conclude their argument on this point with the assertion that a claimant is protected from harassment "by his right to consolidate the cases for trial in any of the districts he may select." As noted in the previous pages in which Intervenor's answer to the Petition is set forth, the right to consolidate is an empty one.

In the first place, Petitioners are assuming that the only harassment that can arise through the institution of multiple seizures is the necessity for trial of numerous law suits. Were that the sole basis for Intervenor's claim in the District Court that the actions of the Petitioners were oppressive to the extent of permanently ruining a business, perhaps there would be merit in Petitioners' claim. But the irreparable nature of Intervenor's injuries goes much, much farther than the mere necessity of defending numerous law suits. It goes to the demoralizing effect upon Intervenor's distributing organization; to the irretrievably lost good will of the Intervenor's customers because of the stigma which attaches to Intervenor's business because of the actions of Petitioners; to the uncompensable damage to the seized products which are now valueless; to the intangible, but nonetheless, damaging effect of conducting a lawful business under the constantly prevailing fear of utter destruction; and to the very tangible losses of over $100,000 per month which have resulted from the oppressive and arbitrary actions of Peti-

tioners. No law exists to recompense Intervenor for its losses and, as the Congress recognized in House Report 2139, 75th Congress, in referring to seizures as a harsh remedy:

> "A seizure case finally decided in favor of a defendant leaves him without recourse for his losses, including court costs, storage and other charges."

Petitioners' claim that all the authorizing decision does is permit the filing of law suits, is certainly a rank understatement on the facts of damage already caused in this case, which damage the Congress clearly had in mind in imposing safeguards on the unleashing of multiple seizures—possibly hundreds in the instant case. That Petitioners further argument that such decisions are preliminary in character is entirely frivolous is shown by the tremendous irreparable damage already done to Intervenor herein by only 10 libel seizure cases. What several hundred would do if Petitioners are allowed to carry out their threats is readily foreseeable. When immediate irreparable injury follows therefrom no decision can be considered as merely preliminary in effect.

In the second place, and with further reference to the right to consolidate, that right is ineffective in the event that after one consolidation, many more seizures are made as here threatened necessitating further and similarly useless consolidations.

And in the last place, Petitioners fail to mention that in fact Intervenor cannot avail itself of the right which Petitioners say it has, namely, to consolidate "in any of the districts he may select." As adequately pointed out in detail in paragraph 19 of the amended Complaint Intervenor has been unsuccessful in obtaining a stipulation for the removal of the pending libels for trial in Los Angeles, Intervenor's home district, because of Petitioners' opposition. The right to consolidate and remove to a district selected by Intervenor just does not exist in this case, as Petitioner would have this Court believe.

II. The Special Three-Judge District Court Has Jurisdiction of the Issues Raised in the Amended Complaint

A three-judge district court is properly convened pursuant to 28 United States Code, Sections 2282 and 2284, whenever, as in the instant case, an interlocutory and permanent injunction is sought restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States. In this case Intervenor in its complaint has alleged that the multiple seizure provisions of Section 304(a) of the Food, Drug and Cosmetic Act as applied to it under the facts alleged in the amended complaint violates the due process clause of the Fifth Amendment by denying Intervenor a hearing before Petitioners have inflicted great and irreparable injury upon Intervenor by seizing its property. The facts alleged in the complaint insofar as relevant to this issue are that Intervenor's product is non-toxic and harmless (this Petitioners admit); that no emergency or impelling public necessity requires that summary action seizing Intervenor's property be taken without hearing; that Intervenor twice specifically requested a hearing by the Administrator before irreparable injury was inflicted upon it by summary *ex parte* action and was twice denied a hearing; that Petitioners' *ex parte* action has caused sales losses to Intervenor of $100,000 per month, has caused it to lose thousands of dollars in the value of goods seized, expenses incurred in defending seizure actions and in damage to its good will and to the morale of its national distribution organization. It is alleged that Intervenor's business will be completely destroyed by the further seizures threatened by Petitioners prior to any possible decision in any of the libel seizure actions so that a trial in such actions is not an adequate remedy to prevent the foregoing irreparable injury. Other facts are alleged but these are the chief allegations on this constitutional issue.

This constitutional issue has never been passed upon by any court except insofar as the Special Three-Judge Court

herein passed upon it in its order of April 7, 1949, "that the Defendants' motion to dismiss be and the same hereby is denied." Petitioners' major point on the motion to dismiss was its claim that this infliction of irreparable injury "without hearing" was constitutional. No decision of any Court in this Nation has ever countenanced infliction of irreparable injury by government officials without a hearing in the absence of an impelling public necessity for such injury. (See brief filed herein by Intervenor entitled "Plaintiff's Points and Authorities in Opposition to Defendants' Motion to Dismiss," pp. 15-27). Instances have been approved where governmental action is taken without hearing but only where some adequate remedy exists to prevent irreparable injury *before* such injury is inflicted. (See brief *ibid*, pp. 46-49.)

Intervenor further submits that this Honorable Court in considering the jurisdiction of three-judge courts convened under other sections of the Judicial Code has stated that if the Federal question is substantial then a three-judge court may rest its decision on any ground which in its opinion effectively disposes of the case, and that a three-judge court having once obtained jurisdiction may determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford a final authoritative decision of the controversy between the parties. *Sterling* v. *Constantin*, 287 U. S. 378.

In view of the statements and decisions of this Court, it is respectfully submitted that the Respondents once having obtained jurisdiction by the reason of a substantial constitutional question were at liberty to consider any other issue in the case.

Intervenor, in addition to alleging the unconstitutionality of the multiple seizure provisions of the Food, Drug and Cosmetic Act, has asserted that the actions of the Petitioners in instituting and causing to be instituted the various seizures were unlawful, arbitrary, capricious and unreasonable and were deliberately designed to harass

and vex and completely destroy Intervenor's business prior to a decision in any of the seizure cases. *Petitioners assiduously omit any reference to such allegation in their petition.* Intervenor suggests that upon proof that these allegations or admissions by Petitioners are true, the Three-Judge Court might dispose of the litigation on that ground and thus avoid the other constitutional question. It is with such an issue, as well as others, in view, that the Three-Judge Court has ordered a trial which will include the issue of oppressive abuse of power denying to Intervenor due process of law.

Petitioners claim that the effect of a trial on the issue as to whether or not the Plaintiff's advertising is "in a material respect misleading to the injury or damage of the purchaser or consumer" has the effect of transferring the trial of the merits of the pending libel actions to the District Court for the District of Columbia. This contention is erroneous.

In a single seizure action, the issue before the libel court is whether the labeling is "*misleading in any particular*" (21 U. S. C. § 352(a)). In multiple seizure actions, the issue before the libel court is whether the labeling is "*misleading in any particular.*" In other words, the issue is identical in both instances of single and multiple seizures.

As a condition precedent, however, to the institution of multiple seizures, there must be a decision by the Administrator that the product's labeling is "*misleading in a material respect to the injury or damage of the purchaser or consumer.*" (21 U. S. C. § 334.) For purposes of a single seizure there need be no such finding.

It cannot be said, therefore, that a trial in the libel court affords Plaintiff with a later review of the Administrator's decision that the labeling is "*misleading in a material respect to the injury or damage of the purchaser or consumer*" because the libel court does not try that issue—it tries the issue of whether the labeling is "*misleading in any particular.*"

Furthermore, the issue as to whether the advertising in question is "in a material respect misleading to the injury or damage of the purchaser or consumer" is only part of the broader issue as to whether the actions of Petitioners were arbitrary, capricious and unlawful. Such an ultimate issue is not related to the issues before the libel courts; this distinction is fundamental and is ignored by Petitioners.

It has been universally accepted that multiple seizures of innocent products amounts to oppressive conduct which infringes upon the due process of law clause of the Fifth Amendment to the Federal Constitution under the principles established in the case of *National Remedy Co.* v. *Hyde,* 50 Fed. (2d) 1066, decided on June 1, 1931, by the United States Court of Appeals for the District of Columbia. That case was and is the landmark case on this question. There, the Court was confronted with facts almost identically parallel to those of the case in which the Intervenor is the plaintiff in the 3-Judge District Court below. There, as here, multiple seizures of a harmless product had been made; there, as here, plaintiff's business was threatened with complete extinction prior to any adjudication of the merits of the controversy; and there, as here, the dispute involved the advertising used by the Plaintiff in the promotion of its product, and not the product itself. In the following language the Court significantly observed that the procedure which permitted the institution of multiple seizures was lacking in the attributes of due process:

> "In the present case, the action and proposed action of the Department would, under the averments of the bill, in effect deprive appellant of its property through the destruction of its business before the issues could be determined by the court. The result, therefore, would be little different than as though no provision had been made for judicial review. Such a course of conduct on the part of the Department amounts to arbitrary exercise of power, and is a deprivation of due process of law . . ."

Earlier the Court had observed that:

> ". . . if such certification (of facts to the Department of Justice for institution of seizures) should be made in every district where a product might be found, the manufacturer would be crippled or ruined long before the final adjudication. Such a result, we think, was not contemplated by Congress, except possibly in unusual cases where drastic action would be necessary for the immediate protection of the public. Is this a case of that character? We think not."

Without reviewing the legislative history of the 1938 Act in detail, it is clear that Congress intended the principles of justice enunciated in the *National Remedy* case to be as equally applicable under the 1938 Act. In fact, many writers agree that the limitation placed upon the multiple seizure power of the Federal Government in this case was codified into and became an integral part of the 1938 Act. This typical view was expressed by *Michael F. Markel,* the former Senior Attorney of the General Counsel's staff of the Food and Drug Division of the Federal Security Agency, when, in 1947 at the proceedings of an Institute conducted by the New York University School of Law, he stated:

> "The purpose of this provision is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 Act did not contain a comparable provision. However, in at least one instance (citing the *National Remedy* case) the Court enjoined the institution of more than one seizure because it appeared to the Court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. *This section is virtually a codification of the principle of that case."* (Emphasis supplied.)

The harshness of the multiple seizures was fully recognized by Congress when it was stated in House Report 2139 (75th Cong., 3rd Sess., 1938):

> "In many instances seizure is a harsh remedy and should be discouraged and confined to those cases where the public protection requires such action."

In the light of the *National Remedy* case and of the legislative history of the Act, it can hardly be said that the oppressive and arbitrary action of Petitioners herein bears the sanction and approval of Congress and that Courts of equity were deprived of power to enjoin arbitrary, oppressive and unlawful conduct of public officials under said Act.

In essence, Petitioners contend, and have contended throughout the proceedings below, that a court of equity has no power to grant injunctive relief although the Administrator has acted arbitrarily, capriciously, unreasonably, unlawfully and in complete violation of the standards established by Congress governing the decisions of the Administrator authorizing multiple seizures. Such a contention is contrary to all established principles of jurisprudence. Furthermore, it is absurd to state that Congress has established a standard and yet contend that the Courts are powerless to determine whether or not an administrative official has arbitrarily, capriciously and unlawfully violated the Congressional mandate. Why should Congress set up any standard if there is no power in the courts to review a decision ostensibly promulgated under the established standard? The Food, Drug and Cosmetic Act does not prohibit judicial review by injunction or otherwise; and furthermore, the Administrative Procedure Act (5 U. S. C. § 1009e) provides for review where no other form of review of a decision of an administrative official is provided. This Honorable Court has constantly held that courts have jurisdiction to grant equitable relief when administrative officials, assuming to act under the warrant of Congressional authority, have in fact acted unlawfully and beyond the scope of the granted power. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 96; and *Lane, Secretary of Interior* v. *Watts*, 234 U. S. 525.

Under the allegations, which are to be accepted as true for the purposes of the petition before this Honorable Court, the Administrator has completely violated his statutory duty in determining that the booklet in question is in a material respect misleading to the injury or damage of the purchaser or consumer when the facts are just to the contrary. See *infra* pages 33-34 on these facts.

Under such an erroneous and unlawful decision, and with Petitioners mimeograph equipment in full working order and the names and addresses of over 5,000 of Intervenor's distributors in Petitioners' files, it would be possibe that within a week over one hundred lawsuits could be pending. Examination of Petitioners' files has disclosed that many more seizures are contemplated. Such a widescale and far-flung pattern of lawsuits would completely paralyze and wipe out a lawful business long before a possible adjudication on the merits. To contend that such an aggrieved party has no standing in court would be to frustrate the basic principles upon which our law has been founded. No administrative official is above the law. In *Garfield* v. *Goldsby*, 211 U. S. 249, 252, an erroneous order of the Secretary of the Interior was cancelled where, without statutory authority he struck the name of an enrollee from the roles of an Indian Nation. The Court said in part:

> "But, as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the Courts to restore the status of the parties aggrieved by such unwarranted action."

III. Judge Pine's Decision Did Not Take from the Three-Judge Court Jurisdiction to Consider all Allegations in the Amended Complaint.

Contrary to Petitioners' contentions in paragraphs 10 and 11 of their Petition, Judge Pine's ruling upon the original complaint was not binding upon the Three-Judge Court when that Court had before it in the amended complaint

matters previously considered in Judge Pine's ruling. The Three-Judge Court had the power to consider, if it were so disposed, all the allegations of the amended complaint and to consider Judge Pine's ruling erroneous. The right to adopt such a course was sanctioned by this Honorable Court in *Post* v. *Pearson*, 108 U. S. 418. There, in an action on a contract, the defendant's demurrer to the complaint was sustained and the plaintiff given leave to amend. At the trial the court declined to rule and instruct the jury, as the defendant requested, that the order sustaining his demurrer to the original complaint prevented a recovery against him in the action. This Court stated:

> "The order sustaining Post's demurrer to the original complaint gave the plaintiff leave to amend, and did not preclude the plaintiff from renewing, nor the court from entertaining, the same question of law upon a fuller development of the facts at the trial on the amended complaint."

Similarly, in *Marks* v. *Frigidaire Sales Corporation*, 60 App. D. C. 359, 54 F. (2d) 974, cert. den. 285 U. S. 544, the United States Court of Appeals for the District of Columbia indicated that the action of a motions judge in sustaining a demurrer to a plea did not bind the trial judge. The Court stated:

> "And, while it is highly desirable and convenient that rulings on demurrers and other interlocutory matters should settle the law of the case as it proceeds, yet, when parties plead over and go to final hearing upon the law and facts, prior interlocutory rulings are not res adjudicata, as the plaintiff in error calls them, and are not conclusive on the trial judge who has the ultimate responsibility, as the case is finally presented to the trial court for decision."

As stated in 3 Fed. Cyc. §689 "the expressions of the Supreme Court and of inferior federal courts leave no question that federal courts do not apply the doctrine of the

law of the case as a rule of law limiting the power of the court to reopen what has been decided."

The phrase, "law of the case," merely expresses the practice of courts generally to refuse to reopen what has been decided. It does not limit their power to reopen such an issue. *Messenger* v. *Anderson*, 225 U. S. 436; *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95. However stringent may be the practice of refusing to reconsider what has been done, it is nevertheless only a practice and does not proceed from any absence of jurisdiction. *Remington* v. *Central Pacific R. R. Co., supra.* Thus there is a distinction between the law of the case and *res adjudicata*; the one merely directs discretion, while the other supercedes it and compels judgment. *Southern Railway Co.* v. *Clift*, 260 U. S. 316. The law of the case is not an inexorable command and must not be utilized to accomplish an obvious injustice, *Cochran* v. *M. & M. Transp. Co.*, 110 F. (2d) 519, (C. C. A. 1st 1940) nor will it prevent a different conclusion if a clear case is presented that the initial ruling was plainly wrong. *Brown* v. *Gesellshaft Fur Drahtlose Telegraphie, M. B. H.*, 70 App. D. C. 94, 104 F. (2d) 227, (1939) cert. den. 307 U. S. 640.

It is sufficient that the Three-Judge Court had the power to reconsider the ruling of Judge Pine even where the original complaint and the amended complaint were identical insofar as the allegations of arbitrary and capricious action are concerned. But the amended complaint presented a different situation and alleged different facts, so that the doctrine of the law of the case is entirely inapplicable. As stated in 3 Fed. Cyc. § 689, Page 316:

> "Accordingly, a ruling on an answer or motion in the nature of a demurrer or a motion testing pleadings by way of sufficiency or upon a motion to grant or deny an injunction or on an issue such as laches, is the law of the case upon the same facts; but not as to matters beyond the scope of the decision made upon such ruling, or after or upon other pleadings."

The amended complaint before the Three-Judge Court contained the following new allegations which were not before Judge Pine: (1) that nothing contained in the advertising in dispute is in any respect misleading to the injury or damage of any purchaser or consumer (Amended Complaint, Paragraph 3); (2) that the libels filed have already directly caused Plaintiff's business to diminish from a gross volume of over $500,000 per month to a volume of approximately $400,000 per month, that said libels have caused great and irreparable damage to the good will of Plaintiff's business and have greatly and irreparably damaged the morale and efficiency of Plaintiff's national distribution organization and that if the threatened libels are filed and Plaintiff's product seized thereunder Plaintiff's good will and business will be almost completely destroyed and irreparably injured before Plaintiff can obtain a hearing and adjudication of the lawfulness of its labeling (Amended Complaint, Paragraph 12); (3) that the Plaintiff's products already seized have a retail value of several thousands of dollars (Amended Complaint, Paragraph 14); (4) that Plaintiff's distributors number approximately 5,000 (Amended Complaint, Paragraph 14); (5) that the prosecution of the libels in widely separated parts of the United States is deliberately calculated by Defendants to be oppresive and will ruin and destroy the good will and business of the Plaintiff (Amended Complaint, Paragraph 16); (6) that prior to the institution of multiple libels there had been no judgment in favor of the United States in any proceedings against Plaintiff (Amended Complaint, Paragraph 17); (7) that the Administrator of the Federal Security Agency was twice requested to grant Plaintiff a hearing upon the merits of its advertising and that such request was twice denied (Amended Complaint, Paragraph 18A); (8) that there is no emergency requiring summary action against Plaintiff's product and that no one would be injured if Defendants are enjoined from instituting further libel actions and from proceeding with the existing libel actions other than the first until

the first has been finally determined (Amended Complaint, Paragraph 18B); (9) that Plaintiff has no plain, adequate or complete remedy at law to prevent the injury and threatened injury complained of (Amended Complaint, Paragraph 24); (10) that all libels instituted by Defendants after the first libel are unlawful and void because they were not predicated upon a decision of probable cause by the Administrator of the Federal Security Agency as required by Section 304(a) of the Food, Drug and Cosmetic Act (Amended Complaint, Paragraph 25); (11) that the Defendant Tom C. Clark, as Attorney General of the United States, is responsible for the institution of the multiple libel actions against Plaintiff and that the libel actions other than the first are illegal and void and have been instituted by joint action of the Defendants in violation of Section 304(a) of the Food, Drug and Cosmetic Act and the Fifth Amendment to the Constitution of the United States, in excess of Defendants' lawful authority (Amended Complaint, Paragraph 26).

IV. Mandamus and Prohibition are Drastic and Extraordinary Remedies and Such Writs Should Not be Issued Here Where a Lack of Jurisdiction is not Shown and Petitioners' Remedy by Appeal is Adequate.

The most recent pronouncements of this court emphasize that mandamus and prohibition are drastic and extraordinary remedies reserved for really extraordinary causes where appeal is a clearly inadequate remedy. *Ex parte Fahey*, 332 U. S. 258. Furthermore, such writs will not issue unless a lower court is clearly in error in assuming jurisdiction of a cause or some collateral matter in issue. Intervenor's argument as to the jurisdiction of the Special Three-Judge District Court are included in another section of the brief.

Under the Judicial Code, Petitioners are given a right of appeal directly to this Honorable Court, not only from any final decree or determination of a Three-Judge District Court convened under Sections 2282 and 2284 of the Judicial Code, but also from any interlocutory injunction issued

by a Three-Judge District Court. Furthermore, such appeals are given precedence over other matters.

Petitioners insist, although erroneously, that the temporary restraining order issued by the Respondents is in fact a temporary injunction. If Petitioners were sincere in this contention, immediate steps could have been taken to expedite an appeal to this Court. Such has not been the case.

Petitioners assert that appeal would not be an adequate remedy to protect the public interest. Intervenor respectfully submits that the public-interest argument is without merit as applied to the product and advertising involved in the litigation below. Any argument as to a threat to the public may only be resolved by a trial considering the nature of the advertising which has given rise to this controversy. Undoubtedly this question, although only a part of the broader issue, was to have been considered by Respondents in the trial which had been set for May 9, 1949. Petitioners by seeking the relief requested herein and by asking the stay of all proceedings below have delayed any determination of a fact they ardently, but erroneously, assert at least for the purposes of the cause before this Honorable Court. But for Petitioners' appeal to this Honorable Court the trial in the Three-Judge Court would be over and the case could have probably been decided and on its way to this Court by the speedy appeal procedure specially provided in the Statute.

To further rebut Petitioners' argument that the public interest is involved, it is significant to note that Petitioners have been acquainted with the advertising in question for several years but failed to take any action until September, 1948, when the deluge of multiple seizures began. If the public interest were so great, Petitioners would have certainly acted more promptly.

It is also to be noted that Section 302 of the Food, Drug and Cosmetic Act permits the Petitioners to seek injunctive relief under certain circumstances. If public-interest were seriously involved, it is difficult to reconcile the failure of the Petitioners to avail themselves of the expeditious and effective remedy available by injunction. Rather than

seek an effective remedy, Petitioners have resorted to the "shot-gun" technique of multiple seizures in widely scattered jurisdictions simply on the ground that certain advertising is misleading. Petitioners evidently are more interested in punishing Intervenor by such wide-spread seizures than in their trumped-up public protection smoke screen as only an injunction could stop all sales of a product at the source.

No claim has ever been made that the product involved is dangerous or fraudulent. In fact, the sworn medical testimony of a Medical Doctor employee of Petitioners admits that the product would be effective in the treatment of vitamin and mineral deficiency diseases. (Deposition of Dr. Robert C. Butz, April 25, 1949.) Intervenor respectfully submits that Petitioners by their own conduct rebut the public-danger argument and thus the remedy of appeal given by law is clearly adequate.

It is obvious that a trial is necessary to determine not only the substantial constitutional question raised below, but also to determine other issues properly before the Court. The writs of prohibition and mandamus should not be used in anticipation of an adverse decision, which may or may not be erroneous. The proper procedure for correcting error is appeal. Petitioners thus seek herein to circumvent and by-pass a procedure established and required by law and request relief reserved for most extraordinary cases.

In addition to having an adequate remedy by appeal, Petitioners fail to establish that circumstances are such that the Special Three-Judge District Court is *clearly* without jurisdiction in the matter in question. Without such a showing, a writ of prohibition will not issue. Even if it could be shown (as Petitioners certainly have not) that the jurisdiction of the Three-Judge Court to order the trial herein complained of is doubtful the extraordinary remedies sought herein should be denied. Petitioners cannot show with any degree of certainty that their contentions about possible exercise of erroneous jurisdiction by the Three-Judge Court are at all justified by the record.

To secure the grant of an extraordinary writ, the Petitioners must show a clear exceeding of jurisdiction. Petitioners have failed in this essential requirement.

V. Intervenor Has a Right to Issue a Pamphlet Discussing the Truth of "Deficiency Diseases" and the Value of Vitamins, and Petitioners' Acts of Attempted Suppression Constitute an Infringement of Intervenor's Rights of Freedom of Speech and Press.

While not argued in the Court below there is another part of the broad issue in this case of oppressive abuse of power by Petitioners which deserves consideration, for it requires a trial to develop the essential facts so that it may be urged under the decisions of this Court.

Intervenor has written into its sales booklet, which the Petitioners attack, *the truth* about the existence of what are known to the medical profession as "deficiency diseases." Attached to Intervenor's First Request for Admissions herein (see record of papers filed by Petitioners) are excerpts from the authorities in the medical field verifying all that Intervenors have said about the symptoms of these diseases and the value of vitamin products, such as Nutrilite Food Supplement, for such diseases. The Petitioners' own doctor, Robert C. Butz, in his deposition of April 25, 1949, confirms everything that the booklet and those authorities say about deficiency diseases, their symptoms and the value of the various vitamins for these diseases—in fact, it was seemingly immediately after Dr. Butz did this that the Petitioners decided to file the instant petition.

The Petitioners in general admit, as they must, the foregoing facts but claim they have formed an "opinion" that the booklet is misleading in a material respect to the injury of the purchaser or consumer. J. Donald Kingsley, Acting Administrator of the Federal Security Agency, who made the latest decisions authorizing multiple seizures of Nutrilite was specifically asked:

> "Were you presented with any facts showing that Nutrilite or its labeling had injured or damaged any purchaser or consumer?"

And his answer, over objection of Petitioners' Counsel, was:

> "No, Sir" (pp. 10-11)..

Mr. George P. Larrick, Associate Commissioner of Food and Drugs, who is in general charge of a part of the enforcement work of the Administration, was asked:

> "But you know of no facts showing that anyone has actually been injured by Nutrilite's labeling?
> "Answer. No, I have no such knowledge" (p. 24).

It is most respectfully submitted that under these facts Petitioners are attempting to suppress freedom of speech and freedom of the press just because they in their "opinion" say they draw a conclusion from Intervenor's pamphlet, which is obviously based upon *opinion alone* rather than any facts. Evidently the Petitioners claim that in their opinion Intervenor's pamphlet is not orthodox—yet this Court has held repeatedly that freedom of speech and of the press may only be prevented by public officials to *prevent grave and immediate danger, Winters* v. *New York,* 333 U. S. 507; *United States* v. *C. I. O.,* 335 U. S. 106; *West Virginia* v. *Barnett,* 319 U. S. 624. No such danger is present on the facts of the instant case. In *Hannegan* v. *Esquire Magazine,* 327 U. S. 146 at 158, this Court said:

> "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system . . ."

It is true that freedom of speech and of the press may be restricted but the restrictions are well defined and narrowly limited, and they include the loud and obscene, the profane, the libelous and the insulting and fighting words which by their very utterance, inflict the injury or tend to incite an immediate breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Admittedly, therefore, Intervenor's constitutional freedoms may be limited if neces-

sary to protect the public, but the facts in this case show it is *Petitioners' opinion versus Intervenor's opinion* with the medical authorities agreeing with Intervenor. In both the *Winters* and *Hannegan,* cases *supra* the public authorities claimed the same kind of indirect danger based upon their opinion of what is good for the public which the Petitioners herein rely upon.

In this situation it is most respectfully submitted that the Special Three-Judge Court can consider whether Intervenor's freedom of speech and press have been denied by the oppressive conduct of Petitioners—if necessary, proper amendments to the Complaint could be allowed by the Court under the liberal Federal Rules of Civil Procedure to conform to the facts shown at the trial with a specific reference to the First Amendment of the Constitution of the United States.

CONCLUSION

It is, therefore, respectfully submitted that the writs of prohibition and/or mandamus prayed for herein by Petitioners should be denied by this Court for the reasons hereinabove set forth.

Respectfully submitted,

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May, 1949.